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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

SOCIAL VOCATIONAL SERVICES, INC.,

Plaintiff and Appellant,

v.

NANCY BARGMAN as Director, etc., et al.,

Defendants and Respondents.

C083251

(Super. Ct. No. 34201580002210)

Social Vocational Services, Inc. (Social Vocational) appeals the denial of a petition for writ of mandate under Code of Civil Procedure section 1085. The trial court denied the writ petition on grounds that (1) Social Vocational had not exhausted its administrative remedies with the Department of Developmental Services (Department), and (2) the Department properly rejected Social Vocational's claim that it is entitled to a rate increase due to increased employee healthcare costs resulting from enactment of the Patient Protection and Affordable Care Act (Pub. L. No. 111–148, 124 Stat. 119 (2010) (ACA)).

On appeal, Social Vocational argues it was excused from exhausting its administrative remedies because exhaustion would have been futile, the Department's appeal process was fundamentally unfair, and the Department should be estopped from invoking the exhaustion doctrine. Social Vocational further argues it is entitled to a rate increase because the California Code of Regulations includes employee costs in the definition of reimbursable "services" to the developmentally disabled.

We agree with the trial court that Social Vocational neither exhausted its administrative remedies nor was it excused from doing so. Accordingly, we affirm the judgment.

FACTUAL AND PROCEDURAL HISTORY

Social Vocational's Administrative Action and Appeal

The Welfare and Institutions Code requires the Department to contract with regional centers to provide services to individuals with developmental disabilities. (Welf. & Inst. Code, §§ 4500 et seq., 4620, subd. (a).) The regional centers contract for needed services such as community-based day programs for individuals with developmental disabilities through approved service vendors. (*Id.*, § 4691, subd. (a).) Social Vocational is an approved service vendor of community-based day programs. Social Vocational has provided services to developmentally disabled persons for nearly four decades and has almost 2,000 employees.

Starting in January 2015, the ACA requires large employers to either provide healthcare coverage for their employees or pay a penalty. Social Vocational elected to pay approximately \$2.2 million in ACA-mandated healthcare coverage in 2015. The cost was approximately \$1.8 in 2016 – substantially less than the estimated \$4 million penalty that would have applied in lieu of providing coverage.

Social Vocational receives payment according to rates set by the Department. The Department initially sets a service provider's "permanent payment rate" based on

information submitted by the provider, including information regarding “allowable costs” such as salary, wages, and benefits. (§§ 57434, 57500.)¹ Once a provider’s permanent payment rate has been set, adjustments to the rate are constrained until a new rate-setting procedure is completed by the Department. (Welf. & Inst. Code, § 4691, subd. (b)(3).) For example, rate adjustment may be made for unanticipated program changes. However, “[u]nanticipated program changes shall be limited to the following: [¶] (1) Mandated service adjustments due to changes in, or additions to, existing statutes, laws, regulations or court decisions; and/or [¶] (2) Emergency relocations as required to protect the health and safety of the consumers.” (§ 57920, subd. (c).)

On February 19, 2015, Social Vocational requested a rate adjustment from the Department on grounds the ACA’s enactment constituted an unanticipated program change as a change or addition to the law. (See § 57920, subd. (c)(1).) Requests for rate increases based on unanticipated program changes generally require that “[w]ithin 50 days of receipt of the rate adjustment request from the vendor, the Department shall review the request to determine if it is complete and complies with the requirements of sections 57920 and 57922.”² (§ 57924, subd. (d).) If the vendor submits incomplete information, the Department may request that the vendor supply the missing information within 15 days. (*Id.*, subd. (d)(2).) “If the vendor’s rate adjustment request is complete and complies with the requirements of sections 57920 and 57922, the Department shall approve the vendor’s rate adjustment request within 60 days of receipt of the request.” (§ 57924, subd. (d)(1).)

¹ Undesignated citations to sections refer to title 17 of the California Code of Regulations.

² Sections 57920 and 57922 set forth the general procedures and informational requirements for a vendor to submit a request for a rate adjustment.

The Department denied Social Vocational's request for a rate increase on June 25, 2015. In response, Social Vocational timely filed an appeal to the Department's deputy director on July 2, 2015. A vendor may appeal to the deputy director "[a] rate adjustment request denied by the Department pursuant to Sections 57920 through 57924, except anticipated program changes that were not approved because funding was not appropriated for that purpose." (§ 57940, subd. (a)(4).) The Department's deputy director "shall render a decision on the appeal within 60 days after receipt of all required and/or requested information." (§ 57941, subd. (d).) Based on Social Vocational's filing date, the 60th day would have been August 31, 2015. However, the Department's deputy did not issue a decision by that date.

The California Code of Regulations provides that vendors who are dissatisfied with the decision of the Department's deputy director "may appeal the Deputy Director's decision to the Director within 15 days after receipt of the written decision." (§ 57942, subd. (a).) "An appeal filed with the Director is the final level of appeal." (*Id.*, subd. (e).)

Social Vocational's Petition for Writ of Mandate

Social Vocational filed a petition for writ of mandate in the Sacramento Superior Court on October 7, 2015. Approximately two weeks later, the deputy director issued a decision that denied Social Vocational's administrative appeal. Social Vocational did not appeal the deputy director's denial to the Department's director.

The Department opposed the writ of mandate. The trial court heard the matter and denied the writ petition on two grounds. First, the trial court determined Social Vocational had not exhausted its administrative remedies for failure to file an appeal to the department's director. Second, the trial court ruled employee costs imposed by the ACA did not constitute a "mandated service adjustment" for which the California Code of Regulations allows a rate adjustment. In so concluding, the trial court noted,

“however, that it is not unsympathetic to [Social Vocational’s] plight. The ACA has greatly increased its costs, but the Department will not increase its payment rates. In many ways, [Social Vocational] is between a rock and a hard place. Whether the Department should increase [Social Vocational’s] rates to cover the increased costs imposed by the ACA, however, is a policy question that is properly addressed to the Legislature.”

Social Vocational has timely appealed the judgment denying its writ petition.

DISCUSSION

Social Vocational argues the trial court erred in denying the writ petition for failure to exhaust its administrative remedies. We disagree.

A.

Exhaustion of Administrative Remedies

The exhaustion of administrative remedies requirement “ ‘operates as a defense to litigation commenced by persons who have been aggrieved by action taken in an administrative proceeding which has in fact occurred but who have failed to “exhaust” the remedy available to them in the course of the proceeding itself.’ (*California Aviation Council v. County of Amador* (1988) 200 Cal.App.3d 337, 341 (*California Aviation*)). As our Supreme Court has stated it: ‘In brief, the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.’ (*Abelleira v. Dist. Court of Appeal* (1941) 17 Cal.2d 280, 292.) The rule is a jurisdictional prerequisite in the sense that it ‘is not a matter of judicial discretion, but is a fundamental rule of procedure laid down by courts of last resort, followed under the doctrine of *stare decisis*, and binding upon all courts.’ (*Id.* at p. 293, 109 P.2d 942; see *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1216.) [¶] . . . The doctrine prevents courts from interfering with the subject matter of another tribunal. (*California*

Aviation, supra, 200 Cal.App.3d at p. 341.)” (*Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874.) “We apply a de novo standard of review to the legal question of whether the doctrine of exhaustion of administrative remedies applies in a given case.” (*Id.* at p. 873.)

B.

Social Vocational Did Not Exhaust its Administrative Remedies with the Department

Social Vocational did not appeal the decision of the Department’s deputy director to the director as authorized by subdivision (a) of section 57942. Instead, Social Vocational sought writ relief in superior court without exhausting its administrative remedies with the Department. The failure to exhaust its administrative remedies barred Social Vocation’s action in superior court for a writ of mandate.

C.

Exhaustion of Administrative Remedies was not Excused

Social Vocational seeks to excuse the failure to exhaust its administrative remedies on grounds that further appeal to the Department’s director would have been futile, the administrative appeal process was fundamentally unfair, and the department made statements about the merits of the administrative appeal that should estop it from invoking the exhaustion doctrine. We are not persuaded.

1. *Futility*

The failure to exhaust administrative remedies may be excused “where the administrative remedy is inadequate or unavailable, or where it would be futile to pursue the remedy. (*Jonathan Neil & Assoc., Inc. v. Jones* (2004) 33 Cal.4th 917, 936.) In order to invoke the futility exception, a plaintiff must show ‘ “that the [agency] has declared what its ruling will be on a particular case.” ’ (*Ibid.*) A plaintiff need not pursue administrative remedies where the agency’s decision is certain to be adverse. (*Doster v.*

County of San Diego (1988) 203 Cal.App.3d 257, 261.)” (*Howard v. County of San Diego* (2010) 184 Cal.App.4th 1422, 1430.) “Where the administrative agency has made it clear what its ruling would be, idle pursuit of further administrative remedies is not required by the exhaustion doctrine.” (*Huntington Beach Police Officers’ Assn. v. City of Huntington Beach* (1976) 58 Cal.App.3d 492, 499.)

There is no dispute that Social Vocational did not appeal its rate increase request to the director. Although Social Vocational asserts such an appeal would have been futile, it presented no evidence in support of the assertion. For example, Social Vocational did not introduce any statements of the Department’s director regarding the merits of its rate increase request. Consequently, Social Vocational has not met its burden to demonstrate the appeal to the director would have been futile.

For lack of any evidence demonstrating the Director’s decision was certain to be a denial of the rate increase request, Social Vocational has not met its burden to establish the futility exception to the rule requiring exhaustion of administrative remedies prior seeking judicial relief.³

2. Unfairness

Social Vocational next argues the administrative remedy provided in the form of an appeal to the Department’s director violated due process. Social Vocational reasons that “the fatal unfairness in the Department’s appeals process is a fundamental

³ We note Social Vocational has abandoned the argument advanced in the trial court that the Department’s position in opposing the writ petition established the futility of the administrative process. As the trial court aptly noted, “such a rule would effectively eviscerate the exhaustion doctrine by limiting it to those rare cases where an agency decided not to defend itself against a lawsuit.” We agree with the trial court’s reasoning.

asymmetry: There are no consequences for the Department if it fails to meet its own mandatory deadlines for processing appeals.” We reject the argument.⁴

In essence, procedural due process encompasses the right to notice and a hearing before an impartial decision maker. (*Mathews v. Eldridge* (1976) 424 U.S. 319, 333 [47 L.Ed.2d 18].) This is precisely what section 57942, subdivision (a), provided to Social Vocational – an opportunity to be heard on its request for a rate increase based on its increased employee healthcare costs. However, Social Vocational did not avail itself of that opportunity.

Social Vocational ignores the notice and hearing components of due process to portray the right as one to impose “consequences” on the Department for missing deadlines in administrative appeals. Social Vocational offers no authority supporting this proposition. We reject the proposition based our prior decision in *Wright v. State of California* (2004) 122 Cal.App.4th 659 (*Wright*).

In *Wright, supra*, 122 Cal.App.4th 659, this court held an action for medical malpractice and failure to furnish medical care by Justin Wright, a prisoner, against the Department of Corrections was barred for failure to first exhaust his administrative remedies. (*Id.* at p. 667.) Wright sought to excuse his failure to exhaust his administrative remedies on grounds the Department of Corrections missed its deadline by nearly nine months to decide his third formal level review. (*Ibid.*) Normally, the third

⁴ In support of its due process argument, Social Vocational cites only cases involving *procedural* due process issues, namely *Brown v. City of Los Angeles* (2002) 102 Cal.App.4th 155, at page 169 [examining procedural due process protection] and *Bockover v. Perko* (1994) 28 Cal.App.4th 479, at page 486 [same]. Because Social Vocational constrains its supporting authorities to those involving procedural due process we are not presented with a *substantive* due process argument regarding fundamental unfairness. For this reason, we limit our analysis to whether the administrative appeal options presented in this case comport with procedural due process.

level review must be completed within 60 working days. (*Ibid.*) This court rejected the contention, holding that “the Department’s delay does not excuse Wright’s failure to exhaust his available administrative remedies.” (*Ibid.*) As this court explained, “The remedy for an unreasonable delay is not a suit for damages, but a writ of mandate ordering the Department to perform its duty by completing the review.” (*Ibid.*) We continue to adhere to this reasoning. Social Vocational’s remedy for any delay by the Department was not to ignore its administrative remedies but to secure a writ of mandate to compel the Department to fulfill its administrative duties.

3. Estoppel

Finally, Social Vocational argues the Department and its director “are estopped from invoking the exhaustion doctrine, since they themselves stated in their *initial* response that the regulations did not apply.” (*Italics added.*) This argument has no merit.

As the California Supreme Court has explained, “ ‘The courts of this state have been careful to apply the rules of estoppel against a public agency only in those special cases where the interests of justice clearly require it. [Citations.] However, if such exceptional case does arise and if the ends of justice clearly demand it, estoppel can and will be applied even against a public agency. Of course, the facts upon which such an estoppel must rest go beyond the ordinary principles of estoppel and each case must be examined carefully and rigidly to be sure that a precedent is not established through which, by favoritism or otherwise, the public interest may be mulcted or public policy defeated.’ ” (*City of Long Beach v. Mansell* (1970) 3 Cal.3d 462, 496, fn. 30.)

This is not the sort of special case in which the agency must be estopped. To the contrary, estoppel would undermine the appeal process – both to the deputy director and to the director – by constraining the Department to its *initial* response. This result would

prevent the deputy director and director from engaging in any error-correction by cementing the Department's first response as its only response. Such an outcome is untenable and conflicts with the appeal procedures set forth in sections 57940 and 57942. The Department's initial response did not excuse Social Vocational from pursuing its administrative remedies, but instead made the administrative remedies all the more important to pursue.⁵

DISPOSITION

The judgment is affirmed. Nancy Bargman as Director and the Department of Developmental Services shall recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1) & (2).)

_____/s/
HOCH, J.

We concur:

_____/s/
MURRAY, Acting P. J.

_____/s/
RENNER, J.

⁵ Our conclusion that Social Vocational's action is barred for failure to exhaust its administrative remedies obviates the need to consider the merits of its arguments that ACA-related costs must be included in a rate adjustment. We therefore deny Social Vocational's request for judicial notice of materials related to its rate-adjustment argument as unnecessary to the disposition of this appeal.